SINCERE LEASING SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[TAX APPEAL NO: R3-14-5-97]
4 FEBRUARY 1998

REVENUE LAW: *Income tax - Appeal - Appeal by way of case stated - Application to remit case stated to Special Commissioners - Whether case stated defective - Whether did not comply with practice direction - Whether remission called for - Income Tax Act 1967, Schedule 5 paras. 37, 39, 40*

REVENUE LAW: *Income tax - Case stated - Setting out of - Procedure and contents - Whether Special Commissioners dutybound to refer case stated to parties for comments before forwarding it to High Court - Whether contents of case stated not in accordance with approved practice - Income Tax Act 1967, Schedule 5 paras. 37, 39, 40*

The appellant had applied to remit a case stated to the Special Commissioners pursuant to paras. 39 and 40 of Schedule 5 to the Income Tax Act 1967 ('the Act'). Before the learned judge, the appellant argued that remission was justified as the Special Commissioners, in preparing the case stated, had not referred the same to the parties for their comments and had thus contravened a practice direction of the Federal Court. It was alternatively submitted that the Special Commissioners had inaccurately stated the appellant's contention pertaining to a certain accounting practice and a supplementary case was therefore called for. The facts showed however that the learned Special Commissioners, in the case stated in question, did set forth *inter alia* the facts proved, the contention of the parties, the question for their determination and their conclusion thereon as well as the question for the opinion of the appellate court. This apart, the learned Special Commissioners did also advert to and opine on the appellant's contention aforesaid, though they did not apparently set out in detail all the evidence that were adduced before them. The main issue that arose was whether the case stated herein, upon the facts, could be said to be so defective, or so fatally flawed as to call for its remission to the Special Commissioners.

Held:

[1] The most convenient arrangement of a case stated is to set out the facts in a series of paragraphs, followed by separate paragraphs showing the contentions of the parties and the commissioners' findings respectively.

The statement of law upon which the court's opinion is sought should also be set out in the case. This being the case, the Special Commissioners had clearly prepared the case stated in the usual form in accordance with the set procedure. The case stated was therefore not defective.

[2] Since the case stated was prepared in accordance with the practice direction, there was no necessity for the case stated to be forwarded to the parties for their comments before sending it to the High Court. A mere failure to so send the case stated for comments, in any case, is not fatal and would not render the case stated defective or the proceeding before the High Court invalid. The defect could always be cured by the High Court by virtue of para. 40 of Schedule 5 of the Income Tax Act 1967.

[3] The Special Commissioners can only set forth facts as found by them and not facts which were not so found by them though they may have been made in evidence. A case stated, thus, can only contain facts which the Special Commissioners have accepted and upon which their conclusion is based. In this case, the Special Commissioners had considered both the formulas of the applicant and the respondent, but had rejected the formula as forwarded by the applicant. This apart, the Special Commissioners had also fully stated the facts as found by them. It is clear therefore that the 18-page case stated is full and fair. It follows that there is no merit in the alternative application.

[4] If a request is made for a case stated to be remitted for additional findings to be made or considered, the applicant must show that the desired findings are (a) material to some tenable argument (b) at least reasonably open on the evidence that has been adduced; and (c) not inconsistent with the finding or findings that have already been made. These criteria had not been satisfied in this case.

[5] The affidavits in support of the motion had also not disclosed any omission that would warrant remission of the case stated to the Special Commissioners for amendment and to state a supplementary case. Clearly, a remit would lead to a mere repetition by the Commissioners of the findings that they have already made. This was therefore not a fit and proper case for remission.

[Motion dismissed]

Case(s) referred to:

Comptroller-General of Inland Revenue v. Lim Foo Yong Sdn Bhd [1983] 1 MLJ 43
Consolidated Goldfields Plc v. IRC [1990] STC 357
Currie v. The Commissioners of Inland Revenue 12 TC 245
E v. Comptroller-General of Inland Revenue [1970] 2 MLJ 117
Fen Farming Co Ltd v. Dunsford (Inspector of Taxes) [1973] STC 474
UHG v. Director General of Inland Revenue [1974] 2 MLJ 33

Legislation referred to:
Income Tax Act 1967, s. 33(1), paras. 37, 39, 40, sch. 5
Taxes Management Act 1970 (UK), s. 56(7)

Other source(s) referred to:
Halsbury, 3rd end, vol 20 para 1364, p 691

For the appellant - Dr A Subramaniam; M/s Shook Lin & Bok
For the respondent - Abu Tariq Jamaluddin; Federal Counsel

Reported by WA Sharif

JUDGMENT

Nik Hashim J:

The appellant, by a notice of motion, applied under paras. 39 and or 40 of Sch. 5 to the Income Tax Act 1967 (the Act) that:

(i) the case stated be remitted to the Special Commissioners to be redrafted as a whole in compliance with the direction of the Federal Court in *E v. Comptroller-General of Inland Revenue* [1970] 2 MLJ 117, alternatively;

(ii) to send back the case stated to the Special Commissioners for a supplementary case with a direction to:

(a) rectify the contentions of the appellant under 7(ii) of the case stated by deleting the word "gross" and substituting it with "nett', and

(b) comprehensively and accurately state the contentions of the appellant under para. 7(iii) of the case stated as follows:

> the method of apportionment as adopted by the Respondent will result in a disproportionate amount of the common expenses and capital allowances allocated to leasing business; and this not only does not reflect the nature of business but violated section 33(1) of the Act. The disproportionate expenses allocated to leasing violated section 33(1) which among other things state "... all outgoings and expenses wholly and exclusively incurred during that period in the production of gross income from that source ... ." Due to the disproportionate amount of common expenses being allocated to leasing, taxable profit for non-leasing was substantially created for which it was not provided for nor was it intended for by the Act.

(c) include a finding of fact in respect of issue of the accounting practice adopted in cases such as this.

The Special Commissioners of Income Tax at paras. 7(ii) and 7(iii) of the case stated recorded the appellant's contentions as follows:

> (ii) The Respondent had erroneously computed the apportionment between the two sources according to the ratio of lease rental receivable to gross income from other sources:
>
> (iii) The method of apportionment as adopted by the Respondent will result in a disproportionate amount of the common expenses and capital allowance allocated to leasing business. This does not reflect the nature of the business; and ....

Learned counsel for the applicant complained that the case stated was not referred to the parties after preparation by the Special Commissioners. The proper procedure to be adopted by the Special Commissioners was to send the draft of a case stated first to the successful party and then to the other party for their comments. This procedure was a requirement by a direction of the then Federal Court in the case of *E, supra*. According to counsel, the Special Commissioners were bound by the decisions of the then Federal Court.

In approving the above procedure, Gill FJ in that case at p. 120 said this:

> I believe it is well within the province of this court to direct that that practice should be followed, and I would make a direction accordingly. It is an admirable practice and, if followed, there will seldom arise the necessity for a court to order the case to be remitted to the Commissioners in order to put right the case stated.

As to how a case stated was to be out, reference was made to an observation in *E's* case at p. 119 – 120 of *Halsbury*, 3rd edn. vol. 20 para. 1364 at p. 691:

> ... The most convenient arrangement of a case stated is to set out *the facts in a series of paragraphs, followed by separate paragraphs showing the contentions of the parties and the commissioners' findings respectively. The statement of law upon which the court's opinion is sought should be set out in the case*. In cases where the commissioners have to deduce a conclusion of fact from primary facts admitted, or proved before them, the question of law is whether the primary facts found or admitted can support the further conclusions of fact, and the point ought to be so stated. (Emphasis added).

On going through the case stated, I found that the Special Commissioners had prepared the case stated in the usual form in accordance with the set procedure as suggested by *Halsbury* above. Facts admitted (at para. 6(a) pp. 3, 4 and 5); facts proved (at para. 6(b) p. 5); the contentions of the parties (at para. 7 pp. 5, 6, 7); the question for their determination with their conclusion (at para. 10 pp. 8 - 17) and the question for the opinion of this court (at para. 13 p.

18) were set out in a series of paragraphs at the various pages in the case stated accordingly. Since the case stated was prepared in accordance with the practice direction as approved by *E, supra*., then in my view, there was no necessity for the case stated to be forwarded to the parties for their comments before sending it to the High Court. The main purpose of the practice, in my view, was to serve as a guide for the Special Commissioners to follow when preparing a case stated, as before *E's* case, there was no clear cut procedure laid down in Schedule 5 in relation to an appeal from the Special Commissioners to the High Court. In this case, the gist of the practice direction had been complied with in that the contents of the case stated were set out in accordance with the approved practice. Thus, mere failure to send the case stated to the parties for their comments before forwarding it to the High Court, to my mind, was not fatal, and such failure would not render the case stated defective and the proceeding before the High Court invalid. Whatever defects in the case stated, if there is any, could always be cured by the High Court by virtue of its power under para. 40 of Sch. 5 of the Act. For these reasons, I disallowed the main relief for the case stated to be remitted to the Special Commissioners on the ground that was prayed.

With regard to the alternative relief to have the case stated remitted to the Special Commissioners for a supplementary case, I could not do better than refer to the English case of *Consolidated Goldfields Plc v. IRC* [1990] STC 357. In that case, on an application for remitter to the Commissioners for further finding under s. 56(7) of the Taxes Management Act 1970 (UK) (which is identical to our para. 40 of Sch. 5 of the Act), Scott J, at p. 367 said:

> If a request is made for a case stated to be remitted for additional findings to be made or to be considered, Applicant must in my opinion, show that the desired findings are:
>
> (a) material to some tenable argument;
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> (b) at least reasonably open on the evidence that has been adduced, and
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> (c) not inconsistent with the finding or findings that have been already made.

Apart from the above factors, which the court must bear in mind before sending the case back, it must also be noted that para. 37 of Sch. 5 of the Act only requires that the Special Commissioners are to set forth the facts as found by them, the deciding order and the grounds of their decision. The court of appeal is not concerned with the evidence given in the case stated but with the facts therein stated and it is points of law upon those facts the court has to decide (see *UHG v. Director General of Inland Revenue* [1974] 2 MLJ 33). Thus, the Special Commissioners can only set forth facts found by them and

not facts which were not so found by them though they may have been in evidence. In this respect Lord Sterndale MR said in *Currie v. The Commissioners of Inland Revenue* 12 TC 245 at p. 260:

> The Commissioners do not set out all the facts that they hear, but they do, for the reason I have mentioned, set out to some extent the facts upon which come to their conclusion.

Neither they are required to state in detail the evidence which had been adduced before them, for the acceptance or rejection of the evidence is a matter for the Special Commissioners only (see *Fen Farming Co Ltd v. Dunsford (Inspector of Taxes)* [1973] STC 474). Therefore, a case stated can only contain facts which the Special Commissioners have accepted and upon which their conclusion is based.

Applying the above principles to the present case, I found there was no merit in the alternative application, either. A perusal of the case stated clearly showed that the learned Special Commissioners had stated facts as found by them. The proposed amendment to para. 7(ii) which was to delete the word "gross" and to substitute it with "net" could not be allowed as it would be contrary to the method of apportionment adopted by the respondent which was based on the gross income.

With regard to the suggested amendment to the contention under 7(iii) (see ii(b) above) to add and to rely on the provision of s. 33(1) of the Act, Counsel for the respondent who appeared in the proceeding before the Special Commissioners, verified in his affidavit in reply that the appellant did not at any material time rely on s. 33 of the Act as one of its contentions at the hearing before the Special Commissioners. It is significant to note that counsel for the appellant before me was not the counsel at the hearing. However, since the provision of s. 33 was referred to and discussed by the Special Commissioners at pp. 14, 15 and 16 of the case stated, the proposed contention, in my view, was sufficiently covered and therefore not necessary. Indeed, it was rightly conceded by counsel for the appellant that this suggested addition to the contention was not material.

Respecting the issue of accounting practice which the appellant insisted it to be included as a fact in the case stated, I wish to reiterate that the Special Commissioners do not set out all the facts that they hear, or even that have been adduced in evidence, for the acceptance or rejection of the evidence is a matter for the Special Commissioners only. They are not required to state in detail the evidence which had been adduced before them. In this case, the proposed facts were actually one of the contentions of the appellant before the Commissioners (see para. 7(iv) p. 6 of the case stated). In fact the Special

Commissioners had considered the appellant's formula as stated at pp. 9 and 10 of the case stated. After stating both the formulas of the appellant and the respondent and appreciating them, (see pp. 6 to 12), the Special Commissioners at p. 12 of the case stated said:

> As stated earlier, the formulas used by both the appellant and the respondent is similar, it is in the composition of the income that the appellant and the respondent differ.

and after saying that, the Special Commissioners proceeded to hold at the same page "the method applied by the respondent is not excessive and erroneous and is in line with the provisions of the tax laws". So, it was clear from the case stated that the Special Commissioners had considered and rejected the formula by the appellant even though it was contended that the appellant's formula was in line with the accounting practice.

The case stated contained only facts which the Special Commissioners had accepted and upon which their conclusion was based. In this case, I found their 18-page case stated full and fair. They were entitled to draw their own conclusion from, the facts found by them (see *Comptroller-General of Inland Revenue v. Lim Foo Yong Sdn Bhd* [1983] 1 MLJ 43).

The affidavits in support of the motion did not disclose any omission that warrant the remission of the case stated to the Special Commissioners for amendment and to state a supplementary case. A remit would therefore lead to a mere repetition by the Commissioners of the findings they have already made and this would be improper. The appellant had failed to show how each of the suggested amendments was material to its contention and was not inconsistent with the findings that have already been made by the Special Commissioners. All the findings were clearly stated, broadly covered the area desired to be dealt with by the proposed amendments and fact. Their findings and conclusions were certain and adequate for the purpose of the case stated. In my judgment, the case stated was not defective whatsoever.

Having gone through all the records before me, I found that the criteria set out in *Goldfields, supra.*, that should be satisfied before a case stated was sent back had not been satisfied in this case. In my view, this was not a fit and proper case for remission. Therefore, I dismissed the motion with costs.